dence in a trial held without a jury in place of having the expert witness testify on direct examination as to each item contained therein.

STATEMENT OF THE CASE.

This action was brought by plaintiff, Frank Horton and Company, Inc., against defendant, Cook Electric Company, to recover damages for breach of contract. Plaintiff recovered a judgment for $215,758.76 which the Court of Appeals affirmed.

Plaintiff entered into a contract with defendant whereby plaintiff was to bury communication cables at three Air Force installations, for which defendant was to pay plaintiff the sum of $1,080,191.40. Shortly after plaintiff commenced preparation to do the work, defendant cancelled the contract and awarded it to another company at a price $216,039.40 less than the price at which plaintiff had agreed to do it. (Supp. A. p. 4). The facts as to the breach are set out in the opinion below. The petition does not appear to raise any question as to the finding that petitioner breached the contract.

To establish its damages, plaintiff introduced evidence as to the actual costs incurred and as to its estimated profit. Actual expenditures were shown by the testimony of plaintiff's former bookkeeper. (A. 102-3.) To show estimated profit, plaintiff qualified its chief executive officer and principal stockholder, Frank Horton, as an expert in the field of burying cable and established lost profit on the basis of Horton's testimony. (A. 159-64.) Horton had calculated the cost of performance under the contract in great detail in Exhibits 54a, 54b, 55a, 55b, 56a, 56b, 57a and 57b. He determined the lost profit by subtracting the estimated cost of performance from the contract price. (A. 417-19-21.) Defendant cross-examined Horton at length

as to the matters contained in said exhibits and the method of computation used therein (A. 205-210), but introduced no expert testimony of its own as to the estimated cost of performing the work.

The trial court, while recognizing the self-serving nature of Exhibits 54a through 57b, took them into consideration together with other exhibits in arriving at a lost profit determination substantially below that estimated by Horton in his exhibits.

In affirming the trial court, the Court of Appeals noted that the trial court had considered an earlier rough cost estimate prepared by Horton, the more detailed estimate, and Horton's own testimony, and that the trial court recognized the self-serving nature of the cost estimates. The Court of Appeals further noted that the defendant had not offered an expert on the lost profit issue but cross-examined Horton extensively. The Court of Appeals concluded that:

> ". . . In view of the nature of the work to be performed, we think that the district judge properly admitted Horton's cost memoranda. Horton's calculations provided the best method of proving lost profit which could have been adopted." (p. 12a.)

REASONS FOR NOT GRANTING THE WRIT.

I.

The Holding That Horton's Calculations Could Be Introduced as Exhibits Was Correct and Not in Conflict With the Decisions Cited by Petitioner.

This is a diversity suit for breach of contract and on the merits is governed entirely by state law. The petition purports to raise a federal question because the Court of Appeals found no error in the admission as exhibits of

pages of calculations made by a witness on the stand. On petitioner's theory, the witness could have been asked a question as to each item in the eight pages of the calculations, but it was error for the Court to avoid such a substantial waste of trial time by admitting the calculations themselves and authorizing the witness to be fully cross-examined thereon. We submit that the law is not so unreasonable as to require the time-consuming and useless procedure upon which petitioner insists.

The two cases which petitioner claims to be in conflict with the decision below are readily distinguishable. *National Labor Relations Board* v. *Federal Dairy Co.*, 297 F. 2d 487, 489 (C. A. 1, 1962); *Thompson* v. *United States*, 342 F. 2d 137, 140 (C. A. 5, 1965), cert. denied 381 U. S. 926. Indeed, in neither was the use of the challenged document (in each a narrative memorandum, not as here a calculation) held to be ground for reversal.

In the *Federal Dairy* case the Court said that the witness should not be allowed to testify from extensive testimonial notes, used instead of original records, without any showing of need to refresh the witness' recollection. But the Court concluded that admission of the document was not a sufficient basis for reversal. In the *Thompson* case, the Fifth Circuit noted its agreement with the dictum of the First Circuit in *Federal Dairy*, but held that in the particular instance it was proper to use a statement given by the witness and typed by a government agent to refresh the witness' memory, even though the formal procedure for establishing an exhaustion of recollection was not complied with.

Neither case was concerned with the problem of how best to present a complicated calculation prepared by the witness, when the only sensible course is to let the court see the calculation rather than have each item brought out

question by question on direct examination, or even by having the witness read it into evidence. The right of cross-examination gives full protection to the opposing party. In this connection Wigmore has stated (5 Wigmore, *Evidence* (3rd Ed. 1940) p. 81):

> "§ 1385a. *Expert Reading a Report prepared beforehand.* So long as the witness is at the trial subject to cross-examination, there can be no sound objection, on the present principle, to the form of delivering his testimony. In particular, he may *read a report prepared beforehand.* The report's statements themselves were indeed not subjected to cross-examination at the time of their composition; but they are *now* subject to it, and that is enough. . . ."

If an expert witness may read his report into the record, there would appear to be no reasonable basis for not permitting introduction of the report itself so long as the witness is on the stand and subject to cross-examination. This has been the position of the Illinois Supreme Court for almost a century: it was established in the case of *Townsend* v. *Radcliffe,* 63 Ill. 9, 15 (1872), where the court stated that the survey report of a commission of three surveyors could be received in evidence in connection with and as a part of the testimony given by one or all of the surveyors. Since the documents were admissible under the law of Illinois, they were properly admitted under Rule 43 of the Federal Rules of Civil Procedure.

II.

The Allegation of Denial of Procedural Due Process of Law Is Unsubstantiated.

In Point V of its petition (p. 15), petitioner has contended that it was denied procedural due process of law because the Court of Appeals superficially disposed of all issues presented and ignored or overlooked the relevant

authorities upon which petitioner relied. Petitioner further alleges that none of the authorities cited by the Court of Appeals supports the proposition of law for which they have been cited and that the Court of Appeals committed the heinous offense of citing authorities not "relied on by either party."

These broad charges are supported by no record references or citations. The opinion of the Court of Appeals, as well as the long opinion of the trial court (A. 12-55) and its comments denying rehearing (A. 80-83), show that both courts gave the case thorough and conscientious consideration and were fully familiar with the facts and principles of law involved.

Petitioner's allegations of denial of procedural due process are in substance no more than an objection that both courts below found against it on the merits. This is hardly a basis for granting a petition for certiorari.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted.

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